

APPEAL NO. 042364-s
FILED NOVEMBER 17, 2004

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on August 11, 2004, in Fort Worth. The hearing officer determined that the respondent's (claimant) average weekly wage (AWW) is \$481.73, and that the unemployment benefits received by the claimant are not considered post-injury earnings (PIE) under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 129.2 (Rule 129.2) and therefore, the appellant (carrier) is not entitled to a reduction in temporary income benefits (TIBs). The carrier appealed both determinations, arguing that the claimant's AWW is \$327.35 and that the claimant's unemployment benefits are considered PIE under Rule 129.2. The appeal file does not contain a response from the claimant.

DECISION

Affirmed, as reformed.

It is undisputed that the claimant sustained a compensable injury on _____. The claimant and her spouse were employed as a management team for a self-storage facility. The claimant testified that as a condition of her employment she and her spouse were required by the employer to reside at the premises of the self-storage facility. The claimant testified that the employer provided the claimant and her spouse a free rent apartment with a garage, and that the employer paid their electric bill and their health insurance premiums. In addition, the employer paid the claimant a salary separate and apart from her spouse. At issue was whether one-half of the market value of the apartment with a garage, electric bill, and health insurance were included in the claimant's AWW. The carrier argued that the apartment with a garage and paid electric bill were not part of an income package provided by the employer, and in the alternative, that the market value of the apartment is considerably less than what the hearing officer determined. The carrier argues that the claimant did not provide documentary evidence to substantiate the electric bill and health insurance premium amounts. Additionally, the carrier argues that the market value of the apartment with a garage, electricity, and health insurance are not considered taxable income with the Internal Revenue Service (IRS) and should not be considered as part of the claimant's AWW with the Texas Workers' Compensation Commission.

AWW

The definition of "wages" in Section 401.011(43) includes all forms of remuneration payable for a given period to an employee for personal services. The term includes market value of board, lodging, laundry, fuel, any other advantage that can be estimated in money that the employee receives from the employer as part of the employee's remuneration.

The hearing officer did not err in determining that the claimant's AWW, in addition to her wages, included one-half the market value of the apartment with a garage, electric bill, and health insurance premiums. The determination of the amounts used to calculate an employee's AWW is a factual matter for the hearing officer to determine. The hearing officer was persuaded by the claimant's testimony and documentary evidence in determining the claimant's AWW. However, we note the hearing officer's Finding of Fact No. 6 contains a mathematical error that affects the correct calculation of the claimant's AWW. The hearing officer miscalculated the weekly market value of the apartment with the garage as \$124.49, rather than \$126.49. We reform the hearing officer's Finding of Fact No. 6 to correct a mathematical error to state that:

Finding of Fact No. 6: The claimant's [AWW] includes one-half of the \$1100.00 a month for an apartment and garage, or **\$126.49** per week (\$1100 divided by 4.3482 equals \$252.97 per week divided by two for the claimant's portion), for a total of **\$1644.37** for the 13 weeks.

Accordingly, we also reform Finding of Fact Nos. 9 and 10, Conclusion of Law No. 3, and that portion of the Decision to state:

Finding of Fact No. 9: The **\$1644.37** for the apartment and garage, the \$261.56 for the electricity, and the \$358.80 for health insurance, totaling **\$2264.73** added to the claimant's total gross pay of \$4023.75 is **\$6288.48**.

Finding of Fact No. 10: **\$6288.48** divided by 13 equals **\$483.73**.

Conclusion of Law No. 3: The claimant's [AWW] is **\$483.73**.

The claimant's [AWW] is **\$483.73**.

Additionally, the evidence supports the hearing officer's determination that the market value of the apartment with the garage, electric bill, and health insurance premiums are included as part of the claimant's AWW under the 1989 Act for workers' compensation benefits regardless of what the IRS may or may not consider taxable income for federal income tax purposes.

PIE

It is undisputed that the claimant received unemployment benefits from February 2 through August 30, 2003. At issue was whether the claimant's unemployment benefits were considered PIE under Rule 129.2. Rule 129.2(c) and (d) provide that:

- (c) PIE shall include, but not be limited to, the documented weekly amount of:
 - (1) all pecuniary wages paid to the employee after the date of injury including wages based on work performed while on modified duty

and pecuniary fringe benefits which are paid to the employee whether the employee has returned to work or not;

- (2) any employee contribution to benefits such as health insurance that the employee normally pays but that the employer agrees to pay for the employee in order to continue the benefits (which does not include the portion of the benefits that the employer normally pays for);
 - (3) the weekly amount of any wages offered as part of a bona fide job offer which is not accepted by the employee which the insurance carrier (carrier) is permitted to deem to be PIE under §129.6 of this title (relating to Bona Fide Offers of Employment);
 - (4) the value of any full days of accrued sick leave or accrued annual leave that the employee has voluntarily elected to use after the date of injury;
 - (5) the value of any partial days of accrued sick leave or accrued annual leave that the employee has voluntarily elected to use after the date of injury that, when combined with the employee's TIBs, exceeds the AWW; and
 - (6) any monies paid to the employee by the employer as salary continuation based on:
 - (A) a contractual obligation between the employer and the employee including through a collective bargaining agreement;
 - (B) an employer policy; or
 - (C) a written agreement with the employee.
- (d) PIE shall not include:
- (1) any non-pecuniary wages paid to the employee by the employer after the injury;
 - (2) any accrued sick leave or accrued annual leave that the employee did not *voluntarily* elect to use;
 - (3) any wages paid by the employer as salary supplementation as provided by Texas Labor Code, §408.003(a)(2);

- (4) any moneys paid by the employer which would otherwise be considered PIE under subsection (c) of this section but which the employer attempts or intends to seek reimbursement from the employee or carrier; or
- (5) any money paid to an employee under an indemnity disability program paid for by the employee separate from workers' compensation.

The hearing officer determined that unemployment benefits are not specifically provided for in Rule 129.2, and therefore, the carrier is not entitled to a reduction in TIBs. We agree. We note that under the Texas Unemployment Compensation Act, Section 207.049(2) provides in part that an individual is disqualified for unemployment benefits for a benefit period for which the individual is receiving or has received remuneration in the form of compensation under a state workers' compensation law or a similar law of the United States for temporary partial disability, temporary total disability, or total and permanent disability. TEX. LABOR CODE ANN. § 207.049(2). The 1989 Act does not contain a provision corresponding to Texas Unemployment Compensation Act, Section 207.049(2) which would disqualify an individual from receiving workers' compensation income benefits for any period he is receiving or has received unemployment compensation benefits. In view of the absence of such a provision, we have previously held that even when unemployment compensation benefits are received, it does not serve as a credit against workers' compensation benefits. See *generally* Texas Workers' Compensation Commission Appeal No. 92198, decided July 3, 1998. Additionally, the Texas Supreme Court has held that a cardinal rule of statutory construction is that all the language and every part of a statute must be given effect and construed together in harmony. National Surety Corporation v. Ladd, 131 Tex. 295, 115 S.W.2d 600, 603 (1938). We have reviewed the complained-of PIE determination. We conclude that the hearing officer's determination is not incorrect as a matter of law or so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

The hearing officer's decision and order are affirmed, as reformed.

The true corporate name of the insurance carrier is **ADVANTAGE WORKERS' COMPENSATION INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CT CORPORATION SYSTEM
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201.**

Veronica L. Ruberto
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Robert E. Lang
Appeals Panel
Manager/Judge